

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,

et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO

COMPANY, et al.,

Defendants.

/

Miami-Dade County Courthouse
Miami, Florida
Wednesday, 1:40 p.m.
May 5, 1999

TRIAL - VOLUME 305

The above-styled cause came on for trial
before the Honorable Robert Paul Kaye, Circuit Judge,
pursuant to notice.

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APPEARANCES:

STANLEY M. ROSENBLATT, ESQ.

SUSAN ROSENBLATT, ESQ.

CLIFFORD DOUGLAS, ESQ.

On behalf of Plaintiffs

DECHEART PRICE & RHOADS

ROBERT C. HEIM, ESQ.

SEAN P. WAJERT, ESQ.

On behalf of Defendant Philip Morris

COLL DAVIDSON CARTER SMITH SALTER & BARKETT

NORMAN A. COLL, ESQ.

On behalf of Defendant Philip Morris

ZACK KOSNITZKY

STEPHEN N. ZACK, ESQ.

On behalf of Defendant Philip Morris

CARLTON FIELDS WARD EMMANUEL SMITH & CUTLER

R. BENJAMINE REID, ESQ.

DOUGLAS CHUMBLEY, ESQ.

On behalf of Defendant R.J. Reynolds

JONES, DAY, REAVIS & POGUE

RICHARD M. KIRBY, ESQ.

DIANE PULLEY, ESQ.

On behalf of Defendant R.J. Reynolds

KING & SPALDING

MICHAEL RUSS, ESQ.

RICHARD A. SCHNEIDER, ESQ.

On behalf of Defendant Brown & Williamson

CLARKE SILVERGLATE WILLIAMS & MONTGOMERY

KELLY ANNE LUTHER, ESQ.

On behalf of Defendants Liggett Group

and Brooke Group

SHOOK HARDY & BACON

EDWARD A. MOSS, ESQ.

WILLIAM P. GERAGHTY, ESQ.

On behalf of Defendant Brown & Williamson

JAMES T. NEWSOM, ESQ.

On behalf of Defendant Lorillard

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APPEARANCES (Continued)

DEBEVOISE & PLIMPTON
ANNE COHEN, ESQ.
JOSEPH R. MOODHE, ESQ.
On behalf of Defendant The Council for Tobacco Research
GREENBERG TRAURIG HOFFMAN LIPOFF ROSEN & QUENTEL
DAVID L. ROSS, ESQ.
On behalf of Defendant Lorillard
MARTINEZ & GUTIERREZ
JOSE MARTINEZ, ESQ.
On behalf of Defendant Dosal Tobacco Corp.
and Tobacco Institute
KASOWITZ BENSON TORRES & FRIEDMAN
AARON MARKS, ESQ.
NANCY STRAUB, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group
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I N D E X

WITNESS	PAGE		
William B. Wecker, Ph.D.			
PLAINTIFFS'	E X H I B I T S		
EXHIBITS	OFFERED	ADMITTED	FOR ID
DEFENDANTS'	E X H I B I T S		
EXHIBITS	OFFERED	ADMITTED	FOR ID
	PAGE	PAGE	PAGE

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1 (Whereupon, the following proceedings were had:)
2 THE COURT: Okay. Have a seat, folks.
3 Everybody here? Ready to go?
4 MR. HEIM: Yes, sir.
5 MR. ROSENBLATT: Yes, Judge.
6 THE COURT: All right. Let's get a jury out,
7 please.
8 (The jurors entered the courtroom.)
9 THE COURT: Okay, have a seat, folks.
10 We're ready for cross.

11 CROSS-EXAMINATION

12 BY MR. ROSENBLATT:
13 MR. ROSENBLATT: Good afternoon, ladies and
14 gentlemen.

15 Q. Dr. Wecker, you and I met for the first time
16 today, correct?

17 A. That's right.

18 Q. You are a statistician, and you have your
19 Ph.D, as I understand it, in the field of Statistics
20 and Management, correct?

21 A. Statistics and Applied Mathematics is a
22 better way to understand it.

23 Q. Looking at your CV, that's the way it's
24 listed there. It's not a big deal --

25 A. Not listed that way. It says Management

6

1 Science, which is a term of art for Applied
2 Mathematics.

3 Q. All right.

4 Now, your academic career stretched from when
5 to when? In other words, when did you start teaching?
6 You said you quit teaching in 1990.

7 A. Quit full-time. I still teach some today. I

8 think 1972 is when I started the University of Chicago.
9 I can double-check that.
10 Q. Okay, so you had about an 18-year career as a
11 full-time academic --
12 A. Right.
13 Q. -- in the field of statistics?
14 A. That's right.
15 Q. Now, 1990, the year you decided not to be a
16 full-time professor anymore, is the same year that you
17 were first hired by the tobacco companies; is that
18 correct?
19 A. Could be, I don't remember --
20 Q. That's what you said in various depositions.
21 A. I'll take your word for it.
22 Q. About 1990.
23 A. Okay, about.
24 Q. And when you were hired by the tobacco
25 companies in 1990, was it essentially for the purpose

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1 of doing what you've explained in the courtroom today?
2 In other words, looking at those million or two million
3 questionnaires and trying to determine statistically,
4 from the standpoint of your specialty, whether the 400
5 death figure was accurate or not accurate; was that
6 your original assignment?

7 A. No. I originally was asked to look at the
8 CPS-II data and analyze it in terms of smoking and
9 health. The 400,000 aspect is just a particular aspect
10 of it.

11 Q. Okay, but I mean, your first assignment from
12 the tobacco companies was to look at the data from the
13 American Cancer Society, those questionnaires that
14 you've discussed with the jury today?

15 A. That's right.

16 Q. And over the years -- well, it wasn't clear
17 to me how -- I understand there are very high-tech
18 computers; but how does one get a million or two
19 million questionnaires and glean the information?

20 I mean, what's the process you have to go
21 through to put yourself in a position to answer the
22 kinds of questions that you were answering today?

23 A. Well, the first stage would be done by the
24 American Cancer Society, where they take the
25 questionnaires in paper form, and they keypunch the

8

1 information into computer readable form.

2 That's always a potentially error prone
3 process, so there would be checking and double-checking
4 process at that stage. But eventually they get the
5 data correct, and they put it on -- in this case, they
6 put it on computer tapes. They're big reels of tape,
7 about 10, 12 inches across. Then those, in turn, can
8 be read by a computer.

9 Q. So how many weeks or months did you have to
10 put in analyzing the information to put yourself in a
11 position to answer the kinds of questions that you
12 answered today?

13 A. Just the data checking -- I wasn't working on
14 it full-time, I have a lot of other things to do -- but
15 in terms of months of elapsed time, just to check the
16 data and make sure it was all correct was several
17 months' work.

18 We're looking at 350 million things here, you

19 can't do that in an afternoon.
20 Q. Exactly. It's a very time-consuming process?
21 A. And also I wasn't pressed for time. I
22 probably took more months. I probably could have done
23 it faster, but I wasn't hurrying.
24 Q. Before you got that -- and by the way, which
25 tobacco company hired you originally? Was it RJ
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1 Reynolds?
2 A. I'm not sure, I don't pay much attention to
3 that. One of them, I don't remember which. I know the
4 name of the law firm.
5 Q. Which law firm?
6 A. Jones Day.
7 Q. That's the law firm that generally represents
8 Reynolds.
9 And that was your first contact, a lawyer
10 from Jones Day?
11 A. Right.
12 Q. Jones Day has a lot of offices in different
13 parts of the country. Where was the particular office
14 where the lawyer contacted you from? Do you know?
15 A. I don't know. They called me at my office in
16 California.
17 Q. Then they came to see you --
18 A. That's right.
19 Q. -- rather than you go to them?
20 A. Right.
21 Q. Before that contact with the Jones Day law
22 firm, had you ever studied or paid any attention,
23 really, or had any reason to pay attention to these
24 questionnaires from the American Cancer Society?
25 A. I had not. I never looked at them.
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1 Q. And I take it -- at the time you were first
2 hired in 1990, were you even aware of this 400,000 plus
3 figure that you've talked about a lot today?
4 A. I might or might not have been. It's the
5 sort of thing you hear on the radio.
6 Q. Right. That is the point I'm trying to make.
7 If you were aware of it, you might have been
8 aware of it as a citizen as opposed to statistician?
9 A. It's correct that I had done no professional
10 statistical work on the subject and had not considered
11 it as a professional subject.
12 Q. Is it fair to say that you had never read or
13 had occasion to read a Surgeon General's Report before
14 you were hired in 1990?
15 A. That's probably true.
16 Q. I mean, I'm not suggesting you were totally
17 unaware that there were Surgeon General -- but you
18 never had any reason professionally to focus in on a
19 Surgeon General's Report?
20 A. Right. They're great big, thick things, and
21 I would never have gotten them into my office and
22 looked at them before 1990.
23 Q. And is it fair to say that, prior to the time
24 that you were hired by the tobacco companies, you had
25 done no research, no writing and no teaching on this

1 particular subject?

2 A. Well, I've done research writing and teaching
3 on statistical methodology.

4 Q. Unrelated to this?

5 A. Absolutely related to this. And my testimony
6 today is really testimony about the methodology and
7 what it means. So I think that's not -- I couldn't
8 agree with you there.

9 Q. Well, I understand, obviously, that you would
10 have taught and you would have been concerned with the
11 methodology of statistics; but were you ever concerned
12 with the methodology of statistics as it related to
13 smoking and health issues particularly?

14 A. Not particularly to any smoking issue, no.

15 Q. I'll get more detailed on this a little
16 later, but you've given testimony in what, 10 or 11
17 cases, representing tobacco issues?

18 A. I think only -- I think four.

19 Q. Well, now, when I say "given testimony,"
20 obviously I'm including deposition or trial.

21 A. Okay, I didn't understand.

22 Q. And I'm really also including if you were
23 retained in a case to give opinions and consult
24 privately with tobacco lawyers, even if you didn't
25 testify.

1 A. Okay. I understand now. So four times I've
2 testified in a courtroom, counting today. And some
3 other times I was asked to, but there was no testimony
4 that was called for.

5 Q. Well, let me go down the list I have -- I'm
6 not sure that it's complete -- and you tell me whether
7 you gave a deposition or whether you testified in court
8 or did both.

9 The Rogers case in Indiana?

10 A. I don't remember if there was a deposition,
11 but that was a trial that I actually attended.

12 Q. And you testified in court. Okay.

13 The Clark case. I think that was in
14 Jacksonville.

15 A. I don't remember that.

16 Q. Does Clark ring a bell?

17 A. No, but it might have been one of those where
18 there was never a trial.

19 Q. Conner, in Jacksonville?

20 A. Same thing. I don't remember a trial of
21 that.

22 Q. But you remember being involved with the
23 case?

24 A. Actually, I don't remember the name. But
25 there were some that I didn't go to trial, and I've

1 just forgotten the names.

2 Q. Well, you were questioned by a Mr. Wilner?

3 A. Yes. I had a list at one time; I don't have
4 it with me. I know the names of the ones that I

5 testified in. I can give you those if you want.
6 Q. No. The point I want to make is -- and we'll
7 discuss the precise number a little later -- but is it
8 fair to say that, with respect to any case that you've
9 given testimony in either by way of deposition --

10 By the way, in this class action case, you've
11 given both a deposition and you've testified in court?

12 A. That's true.

13 Q. You've done both. Is it fair to say that
14 with respect to any case where you have either given a
15 deposition or testified at trial or done both, you have
16 essentially expressed the same opinions that you've
17 expressed today?

18 A. No.

19 Q. What was different?

20 A. Well, there was one where I was asked to
21 analyze a complicated econometric model. And it was
22 quite different than the points that I was raising
23 today.

24 Q. That had to do with Medicaid recoupment
25 costs?

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1 A. Yes, so that was quite different. But the
2 others were similar.

3 Q. Similar to this?

4 A. To this, yes.

5 Q. Now, you are familiar with a body of
6 literature standing for the general proposition that
7 children who are exposed to lead on peeling paint in
8 dilapidated buildings, it does in fact cause brain
9 damage?

10 MR. REID: Objection. Beyond the scope.

11 MR. ROSENBLATT: I can explain that.

12 THE COURT: Are you going to tie it up?

13 MR. ROSENBLATT: Yes. To his field.

14 THE COURT: It seems a little bit off --

15 MR. ROSENBLATT: He's written an article on
the subject, and I'm going to get to that.

16 MR. REID: That's not the rule --

17 THE COURT: We may not have to get into the
18 subject itself, but peripherally, for that purpose.
Overruled.

21 BY MR. ROSENBLATT:

22 Q. As a matter of fact, you've been involved in
23 that issue?

24 A. Yes.

25 Q. You've consulted and been involved in the
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1 issue of whether children's exposure to lead causes
2 brain damage?

3 A. The way you say it it's not an issue, if you
4 eat enough lead it will kill you just dead; there's no
5 issue there. But I have worked on the statistical
6 methods of measuring very low doses and its effect, and
7 been on the committee advising the United States
8 Government on those issues.

9 Q. Well, more fundamentally, you consult with
10 the lead industry, you were hired by the manufacturers
11 of lead to consult with them, and that's how you wound

12 up being involved in that subject; correct?
13 A. No. I got called by people in the
14 Environmental Protection Agency, completely independent
15 of any work that I had done for others.

16 Q. Which happened first, did you first become
17 involved in the lead issue as a result of your
18 employment by the lead industry, or were you first
19 contacted by government?

20 A. The first work I did looking at the effects
21 of lead on human health was consulting work I did for
22 the lead industry. But the government contact was
23 entirely a separate one from that.

24 A. And actually, your testimony and your
25 conclusions with respect to the lead issue have been

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1 very similar to the views you've expressed today. In
2 other words, a whole bunch of people, whole bunch of
3 qualified people who are saying lead causes brain
4 damage in children, you examined the statistics, you
5 did an analysis and you came to the conclusion it's not
6 true, lead does not either lower the I.Q. of children
7 or cause brain damage in children; correct?

8 A. No, I didn't say that. It might well. I
9 wrote an article about a better method for sharpening
10 the methodology to assess those questions. And I
11 applied it to prior work. And showed that the prior
12 work had not had a bias in it.

13 Q. Well, very similar to this situation, you
14 looked at the work that existed with respect to certain
15 people reaching the conclusion that children's exposure
16 to lead causes brain damage or lowers their I.Q., and
17 you wrote a paper, the conclusion of which was based on
18 the evidence and based on the work done in those
19 studies, there's not enough evidence to justify the
20 conclusion that lead causes either brain damage or it
21 lowers the I.Q. of little kids?

22 A. No, you don't phrase it quite right. May I?
23 Q. Sure.

24 A. There's no question that if you eat enough
25 lead, child or adult, it will kill you or injure you

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1 nerves or brain, no question. I'm not saying the
2 contrary.

3 The question is: What to do in the way of
4 sophisticated statistical methodology to see how much
5 the injury might be at very low doses. My paper is
6 about an improved way to make estimates of that.
7 That's the one that was published in the Journal of the
8 American Statistical Association.

9 Q. Let me give you a copy of that article,
10 because I want to ask you some questions about it.

11 The title of your article is: Correcting for
12 Omitted Variables and Measurement Error Bias in
13 Regression with an Application to the Effect of Lead on
14 I.Q.

15 Now, you had a co-author for this article who
16 is -- happened to be the vice-president of your
17 company, William E. Wecker Associates, correct, and
18 that was a Mr. or Dr. Marais.

19 A. Dr. Marais, M-A-R-A-I-S.
20 Q. Dr. Marais also a Ph.D in statistics?
21 A. Mathematics.
22 Q. You're the president of your business, he's
23 the vice-president of your business, and the two of you
24 wrote this article together?
25 A. Right.

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1 Q. Now, in identifying yourselves at the very
2 bottom of the first column on the first page it says:
3 This article grew out of the authors' consulting to
4 former manufacturers of lead-based pigment in a
5 lawsuit.

6 So in other words, people were suing the
7 manufacturers of lead and the manufacturers of lead
8 retained you to be an expert witness or to consult with
9 them.

10 A. Right.

11 Q. And was that a case which in fact went to
12 trial where you testified?

13 A. No, it was no case when they asked. They
14 just said there's a literature there and the literature
15 varies and in the result they get, some researchers are
16 finding effects of lead at low levels, some are not
17 finding them, look at all the work that's been written,
18 talk to the researchers.

19 I traveled to Germany, to Cleveland, talked
20 to different researchers about their programs. "And
21 come back and tell us," they said, "what your
22 assessment is of this literature."

23 And that's what I did.

24 Q. Now, right under the identification of you
25 and Dr. Marais there's that paragraph which is single

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1 spaced, is that called an abstract at the very top?

2 A. I call it a footnote.

3 Q. But it happens to be at the top of the page?

4 A. Oh, the abstract, at the top, okay.

5 Q. Follow along with me the last two sentences
6 of the abstract where it says: For each of the studies
7 we demonstrate that bias corrected estimates of the
8 effect of lead on I.Q. are much reduced in size and are
9 not significantly different from zero.

10 Our methods can be used in other applications
11 involving omitted variables or errors of measurement in
12 the included variables.

13 Well, I understand that sentence to say that
14 in the studies that you looked at, and you correct for
15 bias, the effect of lead on I.Q. is zero.

16 A. No.

17 Q. Okay, how am I misreading that?

18 A. Just it's reduced. It's not exactly zero.

19 But it's reduced because an important factor -- I
20 didn't know you wanted to learn about lead today, but
21 I'll tell you.

22 Q. No, I don't want to -- it's not so much that
23 I want to learn about lead today, Doctor. I want to
24 learn about you.

25 A. I'll try to give a brief but full answer to

1 your question.

2 The variable that was missing from the prior
3 studies was the I.Q. of the parents. I.Q. of parents
4 is important because I.Q. is a hereditary trait. And I
5 pointed out that that is a factor that needed to be
6 taken into account and showed how to do it, and showed
7 that the effect of taking that into account was to
8 change the estimates or make them closer to zero.

9 Q. Well, the original studies that you looked at
10 only had the I.Q. of the mothers. It did not have the
11 I.Q. of the fathers. What you were complaining about
12 was you felt that unless and until you had the I.Q. of
13 the fathers, you really couldn't make the judgments
14 that previous authors had made in these studies?

15 A. Not quite. It's true that the I.Q.s of the
16 fathers were completely missing and I said that that's
17 important information because I.Q. is hereditary, let's
18 try to add that in.

19 The I.Q.s of the mothers were very poorly
20 measured, they didn't have complete I.Q. tests. That's
21 where the measurement error part comes in. So I showed
22 how to adjust for both of those factors so that you
23 could take the important variables on I.Q. into
24 account.

25 Q. Now, you and Dr. Marais wrote your article in
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1 a scholarly journal called the Journal of the American
2 Statistical Association. And it got quite a reaction,
3 didn't it?

4 A. Right. It was a paper that was presented
5 with comment by other reviewers.

6 Q. So go to Page 505. And I want to discuss
7 with you three authors who were very critical of your
8 article.

9 MR. REID: Your Honor, I object to this
10 procedure. This is beyond the scope. Now we're moving
11 into a criticism of the article.

12 MR. ROSENBLATT: Well within the subject --

13 THE COURT: Let's talk about this for a
14 minute.

15 (Proceedings were had at sidebar)
16 BY MR. ROSENBLATT:

17 Q. Okay. Dr. Wecker, getting to the subject of
18 the criticism of your article, and I'll get to that in
19 a few minutes, you responded to the criticism -- and
20 I'll ask you in writing, I think that's part of this
21 document?

22 A. Yes.

23 Q. I'll ask you later on what your response was.
24 But addressing my comments on Page 505, the article by
25 three authors, and the title of the article is:

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1 Comment: Problems With Using Auxiliary Information To
2 Correct For Omitted Variables When Estimating The
3 Effect Of Lead On IQ."

4 And let me identify these authors. According

5 to the article, one is Christene Waternaux; she's the
6 Chief, Division of Biostatistics, New York State
7 Psychiatric Institute, in New York, an Associate
8 Professor of Biostatistics in Psychiatry at Columbia
9 University.

10 And the next author is Eva Petkova, Associate
11 Biostatistician, New York State Psychiatric Institute
12 and Assistant Professor of Biostatistics in Psychiatry
13 at Columbia University.

14 And William DuMouchel, D-U-M-O-U-C-H-E-L,
15 Senior Member of the Technical Staff of AT&T
16 Laboratories-Research, in New Jersey.

17 Now go to page 506, the first column, about
18 three or four lines down, where these three authors
19 say -- And by the way, when they talk about M&W,
20 they're referring to you and Dr. Marais.

21 "We feel, however, that although the M&W
22 method may be reasonable in certain situations, it is
23 quite problematic when applied to the estimation of the
24 effect of body lead burden on children's I.Q."

25 And go down a few lines where it's continued:
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1 We find flaws in the proposed methodology because of
2 M&W's failure to take into consideration substantive
3 knowledge about the nature of the omitted variables and
4 their interrelationships. Furthermore, we do not
5 understand the rationale for choosing the particular
6 four case studies to illustrate their method. Many
7 more studies are available as reviewed in three recent
8 metanalysis of the effect of lead on I.Q. in children.

9 And then going over to the second column, the
10 first full paragraph: For these reasons we strongly
11 disagree that M&W have demonstrated that the effect of
12 lead on I.Q. would be reduced in size and not
13 significantly different from zero in their four case
14 studies where the information on the omitted variables
15 available.

16 We believe that such a sweeping conclusion is
17 unwarranted and leads to an oversimplification of a
18 very difficult scientific question.

19 We also believe that the method that M&W
20 propose is not reasonable for the application they
21 consider.

22 So what's your answer to that criticism?
23 MR. REID: Mind reading the next sentence,
24 too?

25 THE COURT: I can't hear you.

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1 MR. REID: Would you mind reading the next
2 sentence?

3 BY MR. ROSENBLATT:

4 Q. Note that we do not claim a causal
5 relationship between child I.Q. and lead exposure,
6 although the evidence seems to point toward a small but
7 significant effect.

8 What is your answer to this criticism of your
9 methodology that you laid out in your original article?

10 A. There's more than one comment that you've
11 mentioned, so I'll have more than one response.

12 When they pointed out in their comment that
13 they didn't understand why I used the four studies that
14 I used in my -- as case studies in my article, they
15 said there are more available.

16 But as I indicate in the response to their
17 comments, there are more studies available, but none of
18 them report the information that you need to apply my
19 method. I used the only four studies where the
20 reported information was sufficient to apply the new
21 idea that we had for dealing with this problem that
22 they acknowledge is a difficult scientific question, to
23 quote them.

24 The scientific question is what to do when
25 you have these important omitted variables. And

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1 they're agreeing that that's a problem.

2 Now, although they say that the authors
3 should be commended for their detail and clear
4 explanations, and so on, and they go on to say that
5 they think our method might be reasonable in certain
6 situations; they thought it was not here, and they gave
7 their reasons why they thought not.

8 And they tried to illustrate that point of
9 view with a study from Yugoslavia, which was an
10 additional study they had worked on.

11 When I asked them, they sent me the method
12 from Yugoslavia. And I applied my method, and I got
13 the same result that I did before. So I agree with
14 them that it's a difficult thing to confront
15 statistical data when important factors are missing.

16 It was a challenge to try to present
17 something to the literature that might try to overcome
18 that in certain situations. They're right that my
19 method probably wouldn't be useful in every situation.

20 And I said in my response: I agree with
21 that. You have to be thoughtful about the application
22 method. But at least I'm proposing a method that would
23 be useful in some cases.

24 Q. Dr. Wecker, look at the comment which is
25 another criticism by two different authors on page 513.

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1 And in the first column it says, the second paragraph:
2 There is no doubt that lead is toxic to a child's
3 brain. As recently as the 1960s, children who consumed
4 large quantities of lead, usually in the form of lead
5 paint in chips from deteriorating surfaces in old
6 houses, died from lead encephalopathy, a form of
7 increased pressure within the skull. Survivors of the
8 encephalopathy often had seizures, mental retardation
9 and behavior problems. I take it you disagree with the
10 statement of these two authors, Rogan and Ware, that
11 there is no doubt that lead is toxic to a child's
12 brain?

13 A. I don't disagree at all. I said that
14 earlier, if you eat enough lead, like a bunch of lead
15 from paint chips, you can die. It's a dangerous thing
16 to do to eat lead.

17 I was talking about how to get a better
18 measurement of the effect when the doses are very low.

19 I don't dispute, and never have, that if you eat a
20 bunch of lead, it can hurt you.

21 Q. Now, Dr. Ware, one of the authors of this
22 article criticizing you, is the acting dean of the
23 Harvard School of Public Health; is that correct?

24 A. I don't believe that's a criticism. So I
25 think your question is a little unfair there.

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1 Q. Let me go over to the next page in the second
2 column.

3 THE COURT: What page are you on?

4 MR. ROSENBLATT: Page 514. The second column
5 the third line down: Despite these findings, readers
6 should understand that there is an overwhelming
7 literature on the adverse effects of lead exposure on
8 the brain. Brain injuries unquestionably occur at
9 higher exposures, and the biology of lead suggests the
10 possibility of adverse effects at even low levels of
11 exposure.

12 Do you agree with that?

13 A. Sure. It's a possibility. And the question
14 is how to get a good measurement of it. And I tried to
15 contribute to that measurement question.

16 THE COURT: I really think we're getting off
17 track now.

18 BY MR. ROSENBLATT:

19 Q. And you answered these criticisms?

20 A. Yes, I responded to try to -- that's the
21 nature of how you do these kinds of publications.

22 MR. ROSENBLATT: The last question on this
23 subject, Judge.

24 Q. The thrust of your article was that exposure
25 to low levels of lead does not cause brain damage to

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1 children and does not lower their I.Q.

2 A. No, you're missing the point entirely. I
3 don't make any claim about that. What I claim is, the
4 studies that have gone on before have had a failing, a
5 serious failing of not including an accounting for the
6 I.Q. of the parents, when they've done their work. And
7 I tried to show a way to incorporate that.

8 Q. What is the solution to that if the father,
9 for whatever reason, cannot be located or is not
10 willing, or is not willing to submit to an I.Q. test?

11 MR. REID: Your Honor, I object.

12 THE WITNESS: That's why I wrote the paper.

13 THE COURT: I think we're really going way
14 off track. Sustain the objection.

15 BY MR. ROSENBLATT:

16 Q. The 1989 Surgeon General's Report, that you
17 and Mr. Reid talked about, in addition to many
18 specialists in cancer, lung cancer, heart disease and
19 epidemiology, because as you well know, there are many,
20 many experts involved in finalizing and publishing a
21 Surgeon General's Report, correct?

22 A. Yes.

23 Q. And in addition to all those specialties, for
24 the 1989 Surgeon General's Report, there are a lot of
25 statisticians?

1 A. Yes, some.

2 Q. They all didn't get it? I mean, your basic
3 testimony, as I heard it this morning, was, you know:
4 All these people are wrong, 400,000 figure is off the
5 wall. There's no basis, there's no basis to say that
6 400,000 plus Americans die every year as a result of
7 cigarette smoking.

8 And I'm asking you: How come all of these
9 experts got it wrong and you're the only guy in America
10 who has got it right?

11 A. I don't think the statisticians would
12 disagree with my position. The idea that Statistical
13 Association is not proof of cause is something every
14 statistician knows.

15 I wasn't there when the deliberations of the
16 committees went on that wrote this. But I'm confident
17 that it was the statisticians who said: Let's be sure
18 to put in this language 11 to indicate that, when you
19 do the attributable death calculation, that there's an
20 assumption here that all of the things are equal. It
21 did show up in the Surgeon General Report.

22 Q. Isn't it fair to say when there's an
23 acknowledgment page --

24 MR. HEIM: Tell us what you have there.

25 MR. ROSENBLATT: This is the acknowledgment
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1 page of 1989 Surgeon General's Report is Roman Numeral
2 IX.

3 Isn't the way it usually works is that if you
4 are listed in the acknowledgments as having a role in
5 connection with the publication of a Surgeon General's
6 Report, the outside world has the right to assume that
7 you approve of and agree with the conclusions contained
8 therein?

9 MR. REID: Object, Your Honor. That would be
10 speculating.

11 THE WITNESS: I wouldn't think so.

12 THE COURT: Well, only if he knows because of
13 his familiarity with the acknowledgment pages on the
14 kind of work you're talking about. If he's not, then
15 he can say so and move on.

16 THE WITNESS: I can answer that, if you'd
17 like.

18 THE COURT: Go ahead.

19 THE WITNESS: I couldn't think that on a
20 report with as many different chapters and as many
21 different aspects as this, that just because you were a
22 contributor and you were acknowledged as a contributor,
23 that meant that you agreed with every sentence that was
24 in this committee-proposed document. I wouldn't expect
25 that.

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1 BY MR. ROSENBLATT:

2 Q. Wouldn't you agree, Dr. Wecker, from a common
3 sense standpoint, that if one of the epidemiologists or
4 one of the statisticians or one of the biostatisticians

5 listed in the 1989 Surgeon General's Report had the
6 same view that you've expressed this morning, that
7 would really be a terrific witness for the tobacco
8 companies, wouldn't it? He would say --

9 MR. REID: Objection, Your Honor.

10 MR. MOSS: There's an objection, Your Honor.
11 THE COURT: Sustain the objection.

12 BY MR. ROSENBLATT:

13 Q. Do you know Dr. Ronald M. Davis? Do you know
14 anything about him?

15 A. I don't know him personally.

16 Q. Do you know who he is?

17 A. It's the same Dr. Davis that testified here,
18 I suppose.

19 Q. Yes.

20 A. Well --

21 Q. He's the same Davis.

22 This report was prepared by the Department of
23 Human Services under the General Editorship of Smoking
24 and Health, Ronald M. Davis, Director, Ronald M. Davis,
25 Director on Smoking and Health, Center for Chronic

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1 Disease Prevention and Health Promotion, Centers for
2 Disease Control in Rockville, Maryland?

3 And you would agree that generally, when this
4 figure is referred to in the literature, that
5 400,000-plus Americans die every year as a result of
6 cigarette smoking, the most frequent citation comes
7 from the Centers for Disease Control; correct?

8 A. The most frequent citation comes from the
9 Center for Disease Control in terms of the calculation
10 of the number.

11 I think it would be helpful if we looked at a
12 Center for Disease Control document to see how that was
13 qualified.

14 Q. Did you bring one with you?

15 A. No, I don't have one with me. But the
16 qualification is that if you call that number the
17 attributable death calculation, then that's perfectly
18 okay, because statisticians know what that is and how
19 it's constructed. The error only occurs when you start
20 using the word "cause" or suppose that all of the
21 effect of attributable death is the word "smoking," so
22 it's how you use the number, not the number itself.

23 Q. You are aware that before he became the
24 Surgeon General -- the present Surgeon General of the
25 United States is David Sacher who is both an M.D. and

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1 Ph.D. Are you aware that before he became Surgeon
2 General of the United States he was the director of the
3 Centers for Disease Control?

4 A. I didn't know that, but I take your word for
5 it.

6 Q. So there's a listing of the scientific
7 editors of the 1989 report. And then the following
8 individuals prepared draft chapters or portions of the
9 report?

10 Then we go to a continuing listing of those
11 people who prepared draft chapters.

12 Now, are you familiar with Jeffrey E. Harris,
13 who is both an M.D. and a Ph.D, Visiting Associate
14 Professor, Department of Biostatistics, Harvard School
15 of Public Health in Boston; Clinical Associate, Medical
16 Services, Massachusetts General Hospital, and Associate
17 Professor of Economics at Massachusetts Institute of
18 Technology. He is he someone you know?

19 A. Not personally, but I know his work.

20 Q. You know his work?

21 A. Yes.

22 Q. And then Thomas Hodgson, Chief Economist,
23 Office of Analysis and Epidemiology, National Center
24 for Health Statistics. So he's obviously involved with
25 statistics?

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1 A. I thought he was the chief economist.

2 Q. I'm reading the entire thing, Chief
3 Economist, Office of Analysis and Epidemiology, and
4 he's with the National Center for Health Statistics?

5 A. Right.

6 Q. Correct?

7 A. That's correct. You read correctly. But
8 what he's obviously involved in from that I don't think
9 you can tell. I think it is obvious that he's involved
10 in economics, after that I don't think you can tell
11 from reading that.

12 Q. How about Owen Thornberry right over here,
13 Ph.D, Director, Division of Health Interview
14 Statistics, National Center for Health Statistics,
15 Centers for Disease Control, in Maryland. Looks like
16 he's a statistician, wouldn't you figure?

17 A. Maybe. I don't know him.

18 Q. What do you glean from this? He's a Ph.D,
19 Director, Division of Health Interview Statistics?

20 MR. REID: Your Honor, I object, the document
21 speaks for itself.

22 THE COURT: Overrule as far as this last
23 question goes. What does he glean from the title?

24 BY MR. ROSENBLATT:

25 Q. What do you glean from that title? Is he a
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1 statistician?

2 A. I don't know. He may be, that's his
3 position.

4 Q. You just don't know. Okay.

5 A. It's easy to find out. We can look these
6 people up.

7 Q. And Charles Althafer, Assistant Director for
8 Health Promotion and Risk Appraisal, Office of Program
9 Planning and Evaluation.

10 And then when you -- this simply affirms how
11 many people are involved, how many doctors, Ph.D.'s,
12 M.D.s -- some of them have both M.D.s and Ph.D.'s and
13 from a variety of disciplines, correct?

14 A. Correct.

15 Q. Clarice Brown, is that a name you're familiar
16 with, M.S. Data Analyst, Office of Prevention,
17 Education and Control, National Heart Lung and Blood
18 Institute in Bethesda, Maryland?

19 A. No, I don't know that person.
20 Q. Someone who is a data analyst would you
21 assume is a statistician?
22 A. Not necessarily. Sounds like a fairly
23 low-level position.
24 Q. Fairly low level?
25 A. Data analyst.
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1 Q. Michael J. Cowell, FSA, Vice-president and
2 Corporate Actuary, UNUM Life Insurance Company,
3 Portland, Maine. An actuary is involved with
4 statistics, aren't they?
5 A. No, they are involved in actuarial science
6 which is quite different. It's a mathematical subject
7 that's actually older than statistics and has to do
8 with calculating things like life expectancy for
9 insurance companies or payouts for pension funds.

10 Q. And I'm sure you've heard of Lawrence
11 Garfinkel, Vice-president for Epidemiology and
12 Statistics, Director, Cancer Prevention, American
13 Cancer Society, in New York?

14 A. Yes, I know that.

15 Q. He's a statistician?

16 A. I know his work.

17 Q. Is he a statistician?

18 A. I would call him that. I don't have his --

19 Q. As a matter of fact, just like the Surgeon
20 General having access to all kinds of statisticians, so
21 does the American Cancer Society, they employ full-time
22 statisticians, don't they?

23 A. I think so, yes.

24 Q. And at the very bottom, this is someone who
25 I'm sure you'll agree is not low level, Jeffrey Harris,
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1 who is both an M.D. and a Ph.D, department of
2 biostatistics, Harvard School of Public Health,
3 Associate Professor at the Massachusetts Institute of
4 Technology.

5 Now, you are not a biostatistician, correct.

6 A. I'm a statistician.

7 Q. What is the difference? We see the term
8 "biostatistician."

9 MR. REID: Your Honor, I object, that's the
10 second time on that particular person.

11 THE COURT: Overruled.

12 THE WITNESS: Biostatistician would have an
13 area of application, particularly in things biological,
14 would concentrate in that area. But their statistical
15 training is pretty much the same. They would study
16 design experiments than, say, most statisticians.

17 Q. A biostatistician is the kind of person who
18 would be involved with the issues that you've been
19 addressing?

20 A. Not necessarily. They could be or they might
21 not be.

22 Q. Well, they're involved with health issues,
23 aren't they?

24 A. Some.

25 Q. What does the "bio," B-I-O, mean before

1 "statistician"?

2 A. The "bio," as in "biological," means that
3 they're concerned with things that live or grow.

4 Q. And the list of these people involved with
5 the Surgeon General's Report, these doctors, these
6 M.D.s, these Ph.D.'s, just goes on and on, doesn't it?

7 Now, Joan Kleva, Statistician, Division of
8 Vital Statistics, National Center for Health
9 Statistics, Centers for Disease Control in Maryland,
10 are you familiar with her work as a statistician?

11 A. No, I don't know her.

12 Q. But you certainly do know that, like the
13 Surgeon General, the Centers for Disease Control also
14 employs full-time statisticians, such as Dr. Kleva.

15 A. I expect so, yes.

16 Q. Are you familiar with Dr. Steven Stellman,
17 Ph.D., Assistant Commissioner for Biostatistics and
18 Epidemiological Research, New York City Department of
19 Health?

20 A. I've read his work. I don't know him
21 personally.

22 Q. He's obviously a statistician?

23 A. Yes.

24 Q. I mean, you're not aware of either
25 Dr. Stellman or any of the people -- any of the

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1 statisticians or biostatisticians who I've enumerated
2 ever coming out publicly and saying what you've said
3 about the 400,000 figure, that it's unreliable?

4 A. I'm sorry?

5 Q. My question was: In terms of Dr. Stellman,
6 or any of the other statisticians that we've gone
7 through, who contributed to the 1989 Surgeon General's
8 Report, have you ever seen any evidence where they have
9 criticized the 400,000 figure as being in any way
10 unreliable?

11 A. So I'm limited to just the people on this
12 list?

13 Q. Correct.

14 A. Well, I'd say that the language that is
15 included in the report, itself, that repeats the
16 statement of Levin, that the attributable death
17 calculation assumes that there are no other differences
18 between the two groups, that's right in the Surgeon
19 General's Report, as well. So I'd say that's where the
20 statisticians made sure that they had their input.
21 They wanted people to know that that's a fact.

22 Q. Dr. Wecker, when you were hired 10 years ago,
23 by the RJ Reynolds Tobacco Company, the basic thing you
24 were asked to address is the fact that it is repeated
25 over and over and over again, in the medical

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1 literature, as a given that 400,000 plus Americans die
2 every year as a result of cigarette smoking.

3 Without all these qualifications, I mean,
4 that's the statement that's made in a zillion articles,

5 which appear in the New England Journal of Medicine,
6 JAMA and other peer review journals, correct?
7 A. You can see that number in a lot of different
8 articles, right.

9 Q. Do you want me to answer your question?
10 A. If you like.
11 They asked me, when they first came, to just take the
12 data and perform my own analysis, to identify
13 relationships between smoking and health and other
14 factors associated with smoke. They gave me no sharp
15 direction in looking at this issue, attributable
16 deaths.

17 Q. At what point in your relationship with the
18 Jones Day law firm did you become aware of the fact
19 that they were interested in knowing your answer to the
20 question as to whether or not the 400,000 plus figure
21 is reliable or unreliable?

22 A. I don't remember a date. But when I
23 described my analysis and various findings, that's one
24 of the things I pointed out. At some date after that
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1 they said: Perhaps you could make some charts or
2 something and tell that in courtroom testimony. I said
3 I'd be glad to do it.

4 Q. Dr. Thornberry, Director of Health Interview
5 Statistics, National Center for Health Statistics,
6 Centers for Disease Control; so obviously
7 Dr. Thornberry is a statistician working for the
8 National Center for Health Statistics, which is part of
9 the Centers for Disease Control, correct?

10 A. Likely. I don't know him myself.

11 Q. But I mean, based on what you see here?

12 A. I can't see it.

13 Q. I mean --

14 A. Says he's the director. Maybe he's a
15 statistician. Would be a good thing to be if you're in
16 that job.

17 Q. You would assume from this description that
18 he's a statistician?

19 A. Likely true.

20 Q. And Dr. Deborah Winn is the Deputy Director,
21 Division of Health, Interview statistics, National
22 Center for Health Statistics. And you would assume
23 that she has her Ph.D in statistics, right?

24 A. I wouldn't assume that. I can check on it
25 and know if I was right.

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1 I will go this far, may be true, it's likely
2 true, but I don't know it.

3 Q. This list, Dr. Wecker, of doctors, M.D.s,
4 Ph.D.'s, economists, statisticians, oncologists,
5 specialists in internal medicine and heart disease, it
6 starts at Roman Numeral IX and goes through Numeral
7 IXX. And you've seen that, because you've looked at
8 the 1989 Surgeon General's Report, right?

9 A. That's correct.

10 So from 1990, Dr. Wecker, up until today, how
11 many cases have you reviewed for the tobacco companies

12 and either given a deposition and or testified in
13 court?
14 A. There's four, counting this one, where I
15 testified in court. And I don't have a count of the
16 number where I gave a deposition. But there's some
17 more where I gave a deposition.
18 Q. Five or six more, you think?
19 A. Perhaps about that many.
20 Q. Okay. Let me take these down. I want to ask
21 you about one of your charts.
22 Who decided on this word, you or the tobacco
23 companies, "Choices"? Did you decide on the title of
24 this board or did they?
25 A. Well, ultimately it would be my decision,
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1 because I made the board. They don't tell me what to
2 write on, it I don't remember where I first thought of
3 the word "Choice." It seems appropriate.
4 Q. Well --
5 A. I mean, may I just say what I meant to convey
6 with that word?
7 Q. Sure.
8 A. I meant that I was not including in here the
9 parts of the questionnaire that had to do with family
10 history. That would seem like a good way to
11 distinguish.
12 Q. Okay. Now, I think you would agree that the
13 amount of exercise that a person undertakes may have
14 little to do with choice; for example, I mean, someone
15 breaks a leg, someone is sick, feels lousy, has a
16 disease, it's certainly going to affect their ability
17 or inclination to do exercise, isn't it?
18 A. Sure.
19 Q. Same thing with overweight or underweight.
20 Not every overweight person is overweight as a result
21 of either overeating or eating fatty foods; there are
22 thyroid conditions, there are genetic conditions,
23 there's all kinds of explanations, aren't there?
24 A. Absolutely, and that's why risk factors
25 require some careful interpretations.
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1 Q. People don't choose to be overweight or
2 underweight, do they? Does someone get up in the
3 morning: Oh, I want to be 220.
4 Maybe if I'm fighting Holyfield, I'd like to
5 be 220.
6 Does the average person say that?
7 A. They may choose the donut and they may choose
8 not to run their morning exercise. If you don't like
9 the word "choice," I'll pick another one.
10 Q. I love the word "choice," but I don't love it
11 as much as Philip Morris loves it.
12 MR. MOSS: Objection, Your Honor.
13 THE COURT: Let's not play this game.
14 BY MR. ROSENBLATT:
15 Q. The word "choice" is not my word; it's your
16 word, your chart, your title.
17 A. Seems reasonable to me.
18 Q. Seems reasonable.

24 A. It's still a choice. I don't want to make a
25 big thing out of this particular word "choice," but

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1 because you want to support your family, you choose to
2 work. If it weren't for that, a lot of people would
3 just not work.

4 So there's incentives and reasons why they
5 make the choices. And some people choose to work in a
6 factory where they're exposed to toxic substances, and
7 they're propelled in their decisionmaking by the
8 obligations that they have in life. But I still think
9 that's a choice.

10 Q. Some people don't have a choice between being
11 an investment banker on Wall Street and working in a
12 coal mine; don't you agree?

13 MR. MOSS: Your Honor, I object.

14 MR. ROSENBLATT: Well --

15 THE COURT: I think he's trying to make a
16 point regarding this list. At least that's my
17 understanding.

18 MR. ROSENBLATT: Your understanding is
19 correct, Judge.

20 BY MR. ROSENBLATT:

21 Q. Hardly a choice to a lot of people, right?

22 A. Right. Most people who work in a coal mine
23 cannot get a job as an investment banker.

24 Q. Right. Or the kind of job you have?

25 A. As a statistician.

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1 Q. Or the kind of job I have?

2 A. As a lawyer.

3 Q. That's right.

4 A. But they can probably look for jobs other
5 than in a coal mine.

6 Q. Okay. Does going to church or not going to
7 church cause lung cancer?

8 A. It's a risk factor. It's a risk factor for
9 lung cancer. Whether it's a cause or not is not
10 something that a statistician can tell you. But it is
11 a risk factor.

Q. Explain that, how it's a risk factor.

13 A. That people who have low social support, for
14 example, do not attend church or group meetings, tend
15 to have higher cancer rates than people who do have
16 social support. That's a fact. Exactly what that
17 interpretation of that is, why that happens, I can't
18 tell you; but I can tell you it's a risk factor, and
19 the literature says it's a risk factor.

20 Q. And you can also tell me that it would be
21 absurd for anyone to contend that going to church or
22 not going to church causes any disease, that in and of
23 itself. I mean, it's laughable to say that going to
24 church or not going to church causes cancer?

25 A. What I would say is that the group of people

1 who go to church and have other social support tend to
2 have lower levels of illness. And it's not -- it's
3 likely not because of some miraculous heavenly cure.
4 It's generally described as social support. Social
5 support seems to be, in the literature, a factor that
6 promotes health.

7 Q. But isn't this, for example, to use your
8 term, a risk factor that is irrelevant to a person
9 developing lung cancer?

10 A. No. It's not irrelevant. It's still a risk
11 factor.

12 Q. It's not.

13 Do you have the -- I know you put a check
14 mark that the smokers have less exercise than the
15 never-smokers, the smokers go to church less than the
16 never-smoker's; but do you have numbers?

17 A. Yes, I've given them to you. You should have
18 a sheet of paper with the exact numbers on it.

19 Q. I don't.

20 A. I gave that to you in deposition.

21 Q. Not to me. We never met. You sure didn't
22 give it to me.

23 MR. REID: Your Honor, it was
24 Mr. Rosenblatt's colleague.

25 MR. ROSENBLATT: Well, he said, to me.

1 THE WITNESS: It's bound with this
2 deposition. So you have a copy.

3 BY MR. ROSENBLATT:

4 Q. You have the numbers?

5 A. Sure, yes.

6 Q. Okay. How did you get the questionnaires?
7 Did you get that, yourself, from the American Cancer
8 Society, or did the lawyers for RJ Reynolds give you
9 that?

10 A. The lawyers mailed them to me. But they came
11 -- the tapes, themselves, were done by the American
12 Cancer Society and not by the lawyers. But they came
13 in the mail.

14 Q. From the lawyers?

15 A. The lawyers got them from the Cancer Society
16 and then mailed them to me.

17 Q. So you never had any direct dealings with the
18 American Cancer Society in relation to the
19 questionnaire information; is that correct?

20 A. No. We did call them a couple of times when
21 we were trying to get some questions straight on the
22 tapes.

23 Q. Are you aware of how the American Cancer
24 Society got the cooperation of a million people to fill
25 out a detailed questionnaire? Are you familiar with

1 the background of that?

2 A. Yes.

3 Q. Tell us about it.

4 A. They recruited them sort of as volunteers, so

5 that if I were a worker on that effort, I might go to
6 you and ask -- first I wouldn't go to you if you were
7 18 years old, because they wanted to look at people, I
8 think, 35 and older -- I've forgotten the exact number
9 -- but I would go to you and I would say: Would you
10 like to participate in this study?

11 And if you agreed, I would give you a
12 questionnaire. And if you didn't, then you wouldn't
13 participate.

14 Q. Did the people who filled out the
15 questionnaires get paid?

16 A. I don't think so.

17 Q. Never been anything like this, to your
18 knowledge, in the history of epidemiology, where a
19 million people filled out questionnaires, or is that
20 common?

21 A. It's a pretty big study. Very large study.

22 Q. Largest study you ever heard of?

23 A. I don't have -- there are other very large
24 studies, but I don't have one in mind with 2 million in
25 it.

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1 Q. Oh, yes, this -- I'm looking at this chart,
2 Morton Levin, 1953. What was -- I don't know whether
3 should I call him Dr. or Mr.

4 What was Morton Levin in terms of his --

5 A. Dr. Levin.

6 Q. What was his field?

7 A. Well, he functioned in this article in terms
8 of a statistician. I don't have his credentials.

9 Q. You don't know anything about his
10 credentials?

11 A. Not that I would like to venture without
12 checking. I have the article here. I can look up his
13 details of his credentials.

14 Q. Okay. Why don't you?

15 A. Okay. It's in another book. There's a large
16 book of articles.

17 THE COURT: Go ahead. You can go down there
18 and get it, if you'd like. Save some time.

19 THE WITNESS: Okay, I have the article.

20 Q. So what was Levin's field?

21 A. He was with the New York State Department of
22 Health in Albany, New York.

23 It doesn't give details of his education in
24 here. Just says that he works for the State Department
25 of Health in Albany, New York.

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1 Q. So you don't know whether Morton Levin was a
2 doctor, whether he was a statistician or what he was?

3 A. Well, I know from the work in here that he is
4 writing statistical subject in this paper.

5 Q. Which doesn't make him a statistician?

6 A. Well, it means he's functioning as a
7 statistician. He certainly has had statistical
8 training.

9 Q. Can I look over your shoulder and see that
10 article for a moment?

11 A. Sure.

12 Q. And this article by Morton Levin, the title
13 of which is, "The Occurrence of Lung Cancer in Man,"
14 appears in what publication?

15 A. I don't have the cover page of the
16 publication, so I can't tell you that. We could look
17 it up when it's referred to in another publication. We
18 can figure it out that way.

19 Q. But it's pretty unusual in your experience,
20 isn't it, for an article, if we assume it appeared in
21 some kind of scholarly publication -- you know, he's
22 not identified as Dr., Ph.D, M.D.; it just has his
23 name, Morton L. Levin, New York State Department of
24 Health, but it doesn't tell us what he does with the
25 New York Department of Health.

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1 A. That's not unusual at all.

2 Q. It's not?

3 A. No.

4 Q. So, basically, this man, who you and Mr. Reid
5 were quoting at great length, is someone you know
6 nothing about other than he wrote this article?

7 A. Right. He's the author of the Attributable
8 Death Formula. You can see it right here on --

9 Q. But --

10 A. It's right here on Page 536. And this
11 article is cited in the Surgeon General Report when
12 they cite the author of this calculation.

13 Q. But what are his qualifications to be the
14 author of anything? You don't know?

15 A. Well, I know he's widely published. He's
16 published many articles on this, and I've read them,
17 and they seem competently done.

18 Q. To your knowledge, is Mr. Levin living?

19 A. I don't know. He must be quite old if he's
20 still alive. This was work done in the early '50s.

21 Q. Okay. To your knowledge, has Mr. or
22 Dr. Levin ever testified on behalf of any tobacco
23 company --

24 A. I don't know.

25 Q. -- on this subject or any other subject?

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1 A. I don't know.

2 Q. In your analysis, did you factor in former
3 smokers? You've got smokers, you've got people that
4 never smoked. But what I'm asking you is whether or
5 not you factored into any of your thinking, or any of
6 your formulas, people who used to smoke but quit?

7 A. No. I made -- I intentionally compared the
8 pure cases of never-smokers against current smokers.

9 Q. You would agree, would you not, that it
10 figures that the former smokers, the great majority of
11 them became former smokers as a result of a health
12 problem?

13 A. No, I don't know that that's true. A lot of
14 people quit smoking just because they choose to.

15 Q. You charge \$375 an hour, correct, for your
16 work on these cases?

17 A. Yes.

18 Q. And you said you put months in on the

19 analysis of the questionnaires?
20 A. Months of elapsed time. Not steady work. I
21 might have 30 different things that I'm working on.
22 I didn't mean to give you the impression that
23 I'm working on only this. This is a minority of my
24 time.

25 Q. How many hours since 1990 do you figure
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1 you've put in on the subject of what you testified
2 about today?

3 A. We can do our best to figure that out. I
4 don't have a perfect recall of everything I've done
5 since 1990. We've got this case and two others that
6 were of about the same size. So that, this one I
7 billed 17,000 for my time; so maybe the other two were
8 about the same size, but we'll just assume that. I
9 think it's at least correct to an order of magnitude.
10 The econometric work was really a lot more time
11 consuming, so that would be a larger number. I don't
12 have the number, but you could pick a --

13 Q. What word did you use?

14 A. Econometric.

15 Q. Referring to what?

16 A. Mathematical model, kind of analysis that
17 didn't show up here today.

18 Q. That was in the Medicaid cases?

19 A. Yes. So that was a lot more. I don't have
20 the number, but it would be a lot more than this.

21 And then going back to 1990, there were some
22 years where I didn't do any work at all on this. So it
23 was not like it occupied that much time. But you'll
24 have to add in some more for some of that earlier work.

25 That's about the best I can do here, I don't
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1 have the numbers in my head.

2 Q. But you were asked, on a variety of
3 depositions two years ago, what your earnings were; and
4 in the two years since, you haven't --

5 MR. REID: Your Honor, I object. That's not
6 the proper way to use deposition testimony.

7 MR. MOSS: Can we come sidebar, Your Honor?

8 THE COURT: It's the same argument we had the
9 last time.

10 MR. ROSENBLATT: A little different.

11 THE COURT: I think you need other
12 parameters.

13 MR. ROSENBLATT: No, because --

14 THE COURT: You want to talk sidebar.

15 MR. ROSENBLATT: Something you're unaware of,
16 Judge.

17 (Proceedings were had at sidebar)

18 THE COURT: Let's take a short break, or
19 maybe a long one, I don't know. We'll see.

20 (The jurors exited the courtroom.)

21 THE COURT: All right, we'll be in recess.

22 (A brief recess was taken)

23 MR. ROSENBLATT: It's our position, Judge,
24 that with the memo of law we gave you, and telling you
25 about this very recent Florida Supreme Court case, I

1 think it's very obvious that we should be able to go
2 into the relationship between a party and an expert
3 witness during trial.

4 That's exactly what the language of the
5 Florida Supreme Court stands for, the underlying
6 portion. And really, I think that's also consistent
7 with your ruling with respect to the witness Thomas.

8 THE COURT: Okay.

9 MR. HEIM: Your Honor, let me respond
10 briefly. I just got handed Page 2.

11 MS. LUTHER: Which I just had Olga pass up to
12 the judge. Page 2 is missing from the all State
13 opinion.

14 MR. MOSS: Ours goes from Page 2 to Page 4.

15 MR. HEIM: I don't know whether you have a
16 Page 2 or not.

17 MR. MOSS: I mean, 1 to 3.

18 THE COURT: You're right, it's missing.

19 MS. LUTHER: It's not in the same format, but
20 it is the text that's missing.

21 MR. HEIM: I just got handed Page 2. I noted
22 that what the Court said, in the second full paragraph
23 there, is that the issue presented for our review is
24 whether a party is prohibited from obtaining discovery
25 from the opposing party regarding the extent of that

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1 party's relationship with an expert.

2 That was the issue that was being litigated
3 in this case. It was a matter of obtaining discovery
4 from the opposing party as opposed to the expert,
5 himself. And that was what they decided in this case.

6 And I noted, in particular, they cited the
7 eight factors listed by the Third DCA in Elkin. And
8 those factors expressly limit, one of those factors --
9 it's in the footnote at the very end of the article,
10 footnote 5.

11 And you'll see the third -- the second
12 factor, the expert may be asked, as to the pending
13 case, what he or she has been hired to do and and what
14 the compensation is to be. And they don't disagree
15 with the opinion expressed in Elkin, at all, in their
16 opinion.

17 So I would urge Your Honor that this is not a
18 departure from the rule that limits the expert from
19 being asked about the work that they've done on this
20 case.

21 On the other hand, I would also observe to
22 the Court that he's already answered these questions.
23 Mr. Reid didn't object, nor did any of us, when he was
24 asked these very questions.

25 I don't know whether Your Honor will recall

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1 it but he was asked the questions: How much money have
2 you been paid since 1990?

3 THE COURT: \$17,000 and his partner got
4 25,000.

5 MR. HEIM: And he went back and said: I got
6 paid a lot more for the model than I did in the
7 Medicaid case.

8 He said he didn't recall exactly what that
9 was. But he did answer those questions.

10 And I would observe, as well, to Your Honor,
11 that while you did rule, I believe, as represented in
12 these papers that were handed to you by the plaintiffs
13 with regard to Dr. Thomas, I think that in another
14 application, Your Honor said you thought a little bit
15 more about it, and you went the other way.

16 So I don't think that the Dr. Thomas ruling
17 is a guide here.

18 THE COURT: Look. We're not talking about
19 seeking his income tax returns, we're not talking about
20 getting actuarial account and his 1090s and all the
21 rest of that stuff. What we're talking about, over the
22 period of time, how much of a connection have you had
23 with a party and how much has that party paid you to do
24 whatever work it is you did for that party?

25 And ergo, are you in any way prejudiced for
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1 or against that party because of the connection and
2 because of the money paid? And that's what we're
3 talking about.

4 It goes to show a bias. And I don't see
5 anything wrong with it. I think it's just common
6 sense.

7 MR. MOSS: That's already been asked and
8 answered.

9 THE COURT: I understand what you're saying.
10 I don't know how deep and far he wants to go. So what
11 is it you want to do?

12 MR. ROSENBLATT: Well, Your Honor, what's
13 going to happen, also, you know, when the witness comes
14 back, in terms of my questioning him, I'm going to be
15 somewhat delayed because I'm really trying to eliminate
16 -- it's a time-saving process, because he's given
17 testimony in a whole lot of cases.

18 Now, in certain cases, he said: I'm going to
19 get that information for you. Financial information.

20 I'm going to say this: Is what you said a
21 year and a half ago, do you have it?

22 MR. REID: That's completely inappropriate.

23 MR. ROSENBLATT: Do you have the numbers?

24 THE COURT: It really annoys me with all this
25 business about trying to protect the witness. The
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1 truth of the matter is it probably doesn't mean a whole
2 hill of beans.

3 If you can point out the fact that over the
4 years he's been paid two or \$3 million on behalf of
5 this company for doing whatever work he did, that will
6 say something to the jury.

7 Whether he had 1090s and produces them in
8 court is really of no value. I'm not interested in
9 whether or not he's got the backup support. If he
10 comes out and says: "Yes, these are the kind of
11 figures," unless you can show, for whatever reason you

12 have, that he's understated the position. I don't know
13 if you have that kind of information. That's the
14 purpose for presenting the 1090s.

15 MR. ROSENBLATT: No, I don't have the 1090s.

16 THE COURT: So what are you going to do?
17 He's going to give you a figure. What are you going to
18 do with it? You can't dispute it.

19 MR. ROSENBLATT: I'm going to try to add it
20 up. In every bit of testimony I've ever read, he's
21 always tap-danced around that so that he's never
22 given --

23 THE COURT: He's never answered the question?

24 MR. ROSENBLATT: I don't know. I have to
25 check that out.

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1 MR. REID: Could I get a word in?

2 THE COURT: In a minute, when we're ready.

3 MR. ROSENBLATT: I want to make the point,
4 that this is an issue that comes up in every deposition
5 and every trial, and I'm going to read him, if
6 necessary, from prior --

7 THE COURT: Your position is: You were asked
8 these questions. You said you were going to come up
9 with a figure. Now what is the figure today?

10 He's going to say: I don't know an exact
11 figure today, but it's around so and so.

12 And the question is: Why, if you knew it was
13 coming up, then you didn't make the calculation now for
14 this trial?

15 And then he's going to say: I didn't know
16 you were going to ask the question.

17 And we'll get into that routine, and that's
18 the whole essence.

19 MR. REID: Our position is, Your Honor, those
20 kinds of questions, is why you didn't do it, where you
21 said in another case you'll do it?

22 There's no obligation to do it.
23 Mr. Rosenblatt could have sent a discovery request and
24 asked specifically, but the problem is to go through
25 this stuff that you didn't know -- he can ask him, if

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1 you decide that it's proper to start with, even though
2 the rule makes it clear --

3 THE COURT: The rule doesn't say anything at
4 all about this kind of a thing. What it talks about is
5 other matters outside of this particular --

6 MR. REID: Other cases.

7 THE COURT: Other cases but outside this
8 party.

9 MR. REID: Just so you know, I was referring
10 to 1280, where it says: The expert shall not be
11 required to disclose his or her earnings as an expert
12 for income derived from other services.

13 THE COURT: And it doesn't say for whom.

14 MR. REID: But if the Court is going to
15 permit the inquiry, the inquiry should be what it's
16 already been.

17 THE COURT: I think he's perfectly --

18 MR. REID: The fact that he hasn't calculated

19 it when he had no duty to calculate it, and the
20 impression is that's inappropriate.

21 THE COURT: I disagree with you. I think he
22 can ask it. And I think it all goes to prejudice, all
23 goes to bias, all goes to whether or not the man is in
24 the eyes of this jury, credible, and what goes to
25 credibility and that goes to total honesty. If they

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1 don't think he's been totally honest in all of his
2 preparations for trial and all of the lawyers, they can
3 make that decision.

4 MR. REID: I agree that honesty, but the
5 question doesn't relate to honesty.

6 THE COURT: The man came out, he brought a
7 great big book, he's prepared. That's for the jury to
8 decide. I'm telling you what I'm going to let him ask.
9 You may not like it, appeal it.

10 Okay. Let's proceed.

11 MS. LUTHER: Judge, if I could make one more
12 point, for purposes of preserving the record, what the
13 rule says is that an approximation of the portion of
14 the expert's involvement as an expert witness, which
15 may be based on the number of hours, percentage of
16 hours or percentage of earned income derived from
17 services as an expert witness, you can discover
18 percentage, but can't discover exact dollar amount. I
19 think that's the appropriate way to go about
20 determining bias.

21 THE COURT: Okay. Everybody has got a
22 different view. I'm using what I consider to be the
23 most appropriate view in this case, and that is, I
24 think it's an appropriate question because it goes to
25 bias and it goes to prejudice, and I think the jury is

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1 entitled to know, under the circumstances. We're not
2 talking about a one-shot deal. We're talking 10, 15
3 years of dealing with a particular party. That means
4 something to somebody. So let's bring the jury out.

5 (The jurors entered the courtroom.)

6 THE COURT: All right. Have a seat, please.
7 Let's proceed.

8 BY MR. ROSENBLATT:

9 Q. Dr. Wecker, you said that in the four
10 Medicaid cases that you had testified in, you had been
11 paid a lot more than, for example, on this case,
12 because there was some kind of statistical model
13 relating to Medicaid. How much were you paid in the
14 State cases?

15 A. I don't -- I'd have to go back and look that
16 up. I don't have that number in my head. It was more,
17 but I don't know how much more.

18 Q. You're unable to estimate?

19 A. I'd be guessing. I can tell you that it was
20 more. But maybe -- I'd just be guessing.

21 Q. Isn't it a fact that when your deposition was
22 taken in a variety of cases, whether it was the Texas
23 case or the Minnesota case or the Mississippi case or
24 the Florida case, you were asked questions about how
25 much money you had received from the tobacco companies.

1 And you were going to get that information, at least
2 for the lawyer in that case.

3 Did you ever do that?

4 A. I don't remember which case you're talking
5 about. But if I was asked to do it, I would have
6 provided it to counsel.

7 Q. Have you done that? Have you ever provided
8 to counsel what you've made?

9 A. I don't remember, but if it's a request and
10 counsel says to provide that, I would just go get the
11 invoice files and give it to him.

12 Q. That's really all you'd have to do is get the
13 invoice files --

14 In other words, look, you're a statistician;
15 if you wanted to find out how much money you had been
16 paid from the tobacco companies since they first
17 retained you in 1990 up until today, you could find
18 that out in a day?

19 A. Probably don't have the records going back 10
20 years, but I could find for as far back as I had
21 records, sure. It wouldn't be that difficult.

22 Q. But you haven't done that?

23 A. No, I got it for this case.

24 Q. Well, for this case you said you billed
25 \$17,000 and your associates from the William Wecker

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1 company billed \$40,000. So on this case you've billed
2 a total of \$57,000?

3 A. Right.

4 Q. You know the Attorney General, Texas,
5 Minnesota, Mississippi and Florida cases were more, but
6 you don't know how much more?

7 A. No, I don't remember. But they were quite a
8 bit more, because we just did a quite a bit more work.

9 Q. Were each of them a couple of hundred
10 thousand dollars?

11 A. I could tell you they were more.

12 Q. What is your best estimate, as you sit here
13 today, of the total amount of money that you received
14 from the tobacco companies since you were first
15 retained in 1990? Would it be over a million dollars?

16 A. It seems unlikely; but I suppose it's
17 possible, since I don't know the number.

18 Q. Have you ever referred to certain kinds of
19 statisticians as snipers?

20 A. Oh, I think you're thinking of my one article
21 I wrote where I used that term in tongue-in-cheek
22 fashion.

23 Q. Let's understand what the common usage -- we
24 all know what it means: A sniper is a guy that hides
25 behind a tree and shoots somebody.

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1 A. Yes, but I didn't mean that. I haven't
2 looked at that article in a long time.

3 Q. Well, you're going to look at it now.

4 A. Thank you.

5 Q. Page 270?
6 A. Yes.

7 Q. The Strategy and Tactics of Interdisciplinary
8 Cooperation, by William E. Wecker. Introduction. This
9 is a tongue-in-cheek typeology of statisticians engaged
10 in interdisciplinary cooperation. And you have a
11 sniper, revolutionary, the advisor, but this is what
12 you say about the sniper:

13 The sniper identifies weak or flawed
14 statistical reasoning in seminars and in the
15 professional journals of functional area. He
16 criticizes the statistical methodology and conclusions
17 contained in those papers. Occasionally his criticisms
18 are published, usually as a comment on someone else's
19 paper. His classroom lectures contain many valuable
20 examples of statistical blunders by others.

21 Now, although that may have been a
22 tongue-in-cheek description, isn't it fair to say that
23 that pretty much defines your testimony on direct
24 examination about the 400,000 figure?

25 You have functioned as a sniper, you have
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1 found flaws, you haven't offered anything constructive,
2 you haven't offered a solution; all you've done is
3 criticize.

4 A. Well, there's an element of truth in what you
5 say, but if you'll give me a second, what I meant by
6 "the sniper," this was an entertaining dinner talk I
7 gave, that people asked if I would write it up and
8 publish it. So it's not meant to be all that serious.

9 But I meant the kind of person who criticizes
10 the work of others but isn't doing any work of his own,
11 he's not publishing. I certainly have published and
12 produced new results.

13 When I see a difficult problem, like the
14 problem of measuring the effect of lead, I try to work
15 hard to come up with methodology that positively
16 addresses it.

17 In the testimony here about the 400,000,
18 though, I have to confess that I cannot come up with a
19 formula that can turn observational data into
20 experimental data. No one can do that. That's just a
21 fact of life. No matter how hard I worked I couldn't
22 do that; nobody else could, either.

23 Q. You've never published on this topic?

24 A. Every textbook has this written in it, so no
25 one would publish it, everybody knows it.

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1 Q. But you sure have sniped at the Surgeon
2 General, at the Centers for Disease Control, at the
3 400,000 figure; that you've done?

4 A. That's your way of expressing it. I'd like
5 to think that I've shed some light on the subject by
6 discussing it in a more fulsome way so there would be
7 better understanding of what those numbers mean.

8 Q. I think in an earlier discussion, when I
9 asked you when you were retained by the tobacco
10 companies, you said, I think you agreed 1990 sounded
11 right.

12 I can cite you to an answer you gave on a
13 previous occasion where you said 1990.
14 A. Yes, that sounds about right. I just didn't
15 know for sure.
16 Q. And you were asked to study this large
17 database from the American Cancer Society. I mean,
18 that was your first assignment?
19 A. Right.
20 Q. For example, if I were to ask you today how
21 many hours did you spend on the Minnesota case, could
22 you tell me?
23 A. No, I'd have to look that up.
24 Q. Well, okay. Your deposition was taken in the
25 Minnesota Attorney General case November 13, 1997.
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1 That's about a year and a half ago. And on Page 26, I
2 want to go over some questions that were asked of you
3 and which you gave.

4 You were asked: How many hours have you
5 spent on the Minnesota case?

6 Answer: Shall we put that in the category of
7 something that you want an exact answer on? In which
8 case I'll put it on my to-do list.

9 And the questioner says: Yes.

10 Answer: Then I won't bother to guess, I'll
11 just chase down an exact number.

12 Question: Can we get that by tomorrow?

13 Answer: At our first break, I'll call in and
14 try to get somebody in accounting to figure that out.

15 Did you ever do that?

16 A. I don't remember. I assume I did if I said I
17 was going to do that.

18 Q. Dr. Wecker, you don't smoke, do you?

19 A. No.

20 Q. Your wife doesn't smoke and your three kids
21 don't smoke?

22 A. That's correct.

23 Q. Because you know that it's a lot more than a
24 risk factor?

25 A. No, I don't --

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1 Q. The reason you, your wife and three kids
2 don't smoke is because you're all intelligent people,
3 educated, and you know that cigarette smoking causes in
4 some people terrible diseases and death; isn't that a
5 fact?

6 MR. REID: Objection, Your Honor,
7 argumentative.

8 THE COURT: In this particular case, based on
9 his expertise and reason for testifying, I would agree
10 with you being argumentative, outside the scope of his
11 expertise.

12 Sustain the objection.

13 BY MR. ROSENBLATT:

14 Q. And also on this same deposition, in the
15 Minnesota Attorney General case, in November of 1997,
16 you were asked: How much of your income in 1997 came
17 from your work on the tobacco cases?

18 And again, you basically said that, if your

19 lawyer said it was okay for you to give that
20 information, you would get it. And my question to you
21 is, apparently we're a year and a half later and you
22 still don't have it?

23 THE COURT: Hold on a second.

24 MR. REID: Objection, Your Honor.

25 THE COURT: I think you're treading on some
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1 troubled waters here. I'll sustain the objection.
2 BY MR. ROSENBLATT:

3 Q. Do you remember one time doing an article
4 related to class actions?

5 A. Yes.

6 Q. The title of the article, of which you were
7 the author was: Estimating Damages in a Class Action
8 Litigation.

9 And that was done in 1985. I'll show it to
10 you.

11 A. Right, I just didn't remember the year. But
12 if you're reading it, I assume you're correct.

13 Right. That's mine.

14 Q. Now, that had nothing to do with tobacco
15 litigation, because that was several years before you
16 were hired by the tobacco companies, right?

17 MR. REID: Could I have a copy, please?

18 THE WITNESS: It doesn't relate to tobacco
19 litigation specifically, but it doesn't relate to any
20 kind of litigation specifically. There's no particular
21 litigation involved here. It's just a statistical bias
22 that I was writing about and how to correct for it.

23 BY MR. ROSENBLATT:

24 Q. So this article, "Estimating Damages in a
25 Class Action Litigation," which, of course, a class
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1 action involves a large number of people rather than
2 one or two individuals, correct?

3 A. That's my understanding.

4 Q. And this article was not related to a
5 particular lawsuit?

6 A. No. Like the others, like the lead article,
7 I got interested in the subject because I was involved
8 in a lawsuit. But when I wrote the articles, that was
9 long after the involvement. And they were just written
10 as academic exercises.

11 Q. You had been involved as an expert witness in
12 a class action lawsuit unrelated to tobacco?

13 MR. REID: Your Honor, I object, this is
14 going beyond the scope, at this point, if he's going to
15 go into this further.

16 THE COURT: If it's unrelated.

17 MR. REID: Yes, sir, it's unrelated.

18 THE COURT: I'll sustain.

19 BY MR. ROSENBLATT:

20 Q. You are not an epidemiologist?

21 A. I'm a statistician. But I do statistical
22 work on issues of human health and pollution, and
23 that's sometimes called epidemiology.

24 Q. Dr. Wecker, if you were at a meeting, and you
25 met a colleague, and you were having a cup of coffee,

1 and the colleague said to you: "Are you an
2 epidemiologist," you would say "No, I'm a
3 statistician"?

4 A. No, I would say, "No, I'm a statistician, but
5 I have written some papers on issues of human health,"
6 in case the person wanted to talk about those topics.

7 Q. You've never received a degree in
8 epidemiology?

9 A. Statistics.

10 Q. I'm talking --

11 A. My degree does not say "epidemiology."
12 That's the application of statistics to human health.

13 Q. You've never taught epidemiology?

14 A. Taught the statistical principles.

15 Q. You've never been a professor in the field of
16 public health?

17 A. No.

18 Q. You've never been a student in the field of
19 public health?

20 A. That's right.

21 Q. And you do not consider yourself to be a
22 biostatistician?

23 A. Right. That's a specialization and it's not
24 mine.

25 Q. Do you receive a 1099 from the tobacco

1 companies on a yearly basis?

2 A. I don't think so.

3 Q. I'll tell you what I'm in the process of
4 doing, and that will explain my delays.

5 As you know, you've given testimony in a
6 variety of cases and although I'm taking a long time
7 between questions I'm really eliminating a lot --

8 A. Fine.

9 Q. -- to see what's been covered already.

10 You have not been asked to address the
11 subject of whether cigarette smoking causes particular
12 diseases, because that's outside your field?

13 A. That's right.

14 Q. The consulting firm that you set up, was that
15 set up after you left your full-time job as a
16 professor?

17 A. Yes.

18 Q. And it was always called William Wecker,
19 what, & Associates?

20 A. Associates, Incorporated, right. It's always
21 been called the same thing.

22 Q. It was formed in 1990?

23 A. I believe that's right.

24 Q. How many employees do you have?

25 A. About 15.

1 Q. Fifteen.

2 Is Dr. Marais still with you?

3 A. Yes.

4 Q. Has any medical organization in this country

5 or in the world, the World Health Organization, the
6 National Academy of Sciences, any medical school in the
7 United States, ever come out and questioned the
8 authenticity or the accuracy of the 400,000 figure in
9 the sense that the -- the figure meaning that
10 approximately 400,000 Americans die every year as a
11 result of cigarette smoking?

12 Has any official medical body ever come out
13 against that number and said: The Surgeon General is
14 wrong, the Centers for Disease Control are wrong, the
15 statistics are flawed?

16 A. I don't know of an article like that. But
17 I'm sure in teaching in medical schools they would have
18 explained about these issues. That's fundamental.

19 Q. You've never seen an article to that effect
20 or an official position to that effect, like from the
21 American Heart Association, the American Lung
22 Association, certainly not the American Cancer Society;
23 you've never seen an official position taken from any
24 medical organization to that effect?

25 A. I'll say yes, in the following sense: I have
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1 seen it because, if you look in the Surgeon General
2 Report in the right place, you'll see where it says
3 that these types of calculations, like the 400,000 are
4 being or -- are based on an assumption that there are
5 no other differences between the two groups.

6 To any alert reader, that raises the question
7 of the validity in the event that the two groups are
8 not identical. There are also published articles that
9 have pointed this out by other authors. So I'm not the
10 first to come up with this understanding.

11 Q. You familiarized yourself with the testimony
12 of Dr. Julius Richmond, Former Surgeon General of the
13 United States, Dr. Jesse Steinfield, former Surgeon
14 General of the United States, who's testified in this
15 case, Dr. Ronald Davis, Dr. John Holbrook, Dr. Michael
16 Cummings and Dr. David Burns, all of whom have had a
17 great deal to do with the preparation of Surgeon
18 General's Reports. Is it not true that all of them,
19 without equivocation, accept the 400,000 figure as
20 being a reliable, authenticated figure?

21 MR. REID: Your Honor, I object. That's a
22 misstatement of the testimony, and it would be
23 speculative in any event.

24 THE COURT: Wait.

25 Well, he's mentioned a whole bunch of people.
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1 And the question is basically, is it not true that all
2 of them, without equivocation, accept the figure?
3 Either he knows they have or he doesn't know.

4 MR. REID: May we approach?

5 THE COURT: No. It's an appropriate
6 question. He can answer it if he knows; if he doesn't
7 know, he doesn't know.

8 THE WITNESS: I haven't read the testimony of
9 all those people.

10 BY MR. ROSENBLATT:

11 Q. Well, the testimony of the people that you

12 have read -- and I know you've read Dr. Richmond?
13 A. I don't believe Richmond put that number
14 forward in the trial testimony.
15 Q. Has any Surgeon General of the United States
16 ever argued with or contradicted, or watered down in
17 any way the simple statement, which is accepted in the
18 New England Journal of Medicine, JAMA, and all the
19 prestigious medical journals, that cigarette smoking
20 kills 400,000 Americans every year?
21 MR. REID: I'll object, it's been answered
22 and it's argumentative.
23 THE COURT: It is repetitious.
24 BY MR. ROSENBLATT:
25 Q. You would agree that cigarette smokers are 22
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1 times more likely to die of cancer of the lung than
2 nonsmokers?
3 A. That's true for males, not for females.
4 Q. What's the number for females?
5 A. It's about half that. Talking about in the
6 United States?
7 Let me clarify. That figure is correct for
8 males in the United States. For example, for males in
9 Japan, who smoke more than males here, the number is
10 much lower.
11 Q. So for American men who are smokers,
12 comparing them with American men who are not smokers,
13 the smoking man is 22 times more likely to develop lung
14 cancer than the nonsmoking man?
15 A. That's true.
16 Q. And you're telling us that the smoking
17 American woman is 11 or 12 times more likely to develop
18 lung cancer than the nonsmoking American woman?
19 A. Right.
20 Q. Did you ever have the actual questionnaires
21 in your hand or was it all on computers?
22 A. I didn't have all of them. I had some sample
23 ones.
24 Q. How many would you figure you personally
25 scanned, looked at, read?
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1 A. I may have only had one. I had a sample
2 questionnaire. Maybe there was more than one, but I
3 didn't have any large number of them. In fact, I've
4 made a blow-up of the sample questionnaire, so you know
5 I had it.
6 Q. Would it be fairly easy for you to compute
7 the relative risk of dying of lung cancer between
8 smokers and never-smokers in the population of the
9 people who filled out the questionnaires?
10 A. I already did it. I've done that.
11 Q. When did you do that? I mean --
12 A. One of the early things that I did was to
13 repeat the analysis of the Surgeon General. So I've
14 calculated all of the relative risks that he's
15 calculated.
16 Q. You do agree that, in just about every
17 deposition, from the first deposition you've ever given
18 and in all your testimony, the lawyer representing the

19 plaintiff has always asked you how much money you've
20 received from the tobacco companies?
21 MR. MOSS: Objection, Your Honor.
22 THE COURT: I think we've been through this
23 subject.
24 MR. ROSENBLATT: I'm not going to argue with
25 you, Judge.

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1 BY MR. ROSENBLATT:
2 Q. When you were first contacted in 1990, having
3 never done any tobacco work, having never written on
4 the subject of tobacco and health, having never written
5 on the subject of statistics as it related to whether
6 cigarette smoking causes disease, did you ask the
7 lawyer from Jones Day: How did you happen to select me
8 as opposed to a biostatistician at Harvard or Yale or
9 somewhere else?

10 A. No, I didn't ask.

11 Q. Has it ever come up in the decade of the
12 '90s?

13 A. I've never asked.

14 Q. So to this day you don't know how they got
15 your name or where they heard of you?

16 A. No, but I'm not hard to find. I publish a
17 lot. You look in the statistical journals, you see my
18 name.

19 Q. Yes, you published a lot about other
20 subjects?

21 A. I've published a lot about environmental
22 pollution, ozone pollution, hydrocarbon pollution, this
23 article on lead, which came later, so they wouldn't
24 have had that one. But I don't know how they happened
25 to come by my name.

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1 Q. As with tobacco and lead, whenever you're
2 asked by a manufacturer to get involved, and I know
3 you've testified on behalf of the Ford Motor Company
4 and the Pinto vehicle --

5 A. I don't think so. I think you're wrong.

6 Q. You've never testified or you've never
7 consulted with Ford Motor Company?

8 A. I've consulted to the Ford Motor Company, but
9 I don't remember doing anything about a Pinto vehicle.

10 Q. What subject did you get involved with for
11 Ford?

12 MR. REID: Objection, Your Honor, beyond the
13 scope.

14 THE COURT: Seems to be. Sustained.

15 MR. ROSENBLATT: Well, let me tell you where
16 I'm going.

17 (Proceedings were had at sidebar)

18 MR. ROSENBLATT: Well, I'm getting rid of all
19 all my Ford questions, Judge. It's going to take a
20 while.

21 BY MR. ROSENBLATT:

22 Q. You testified on behalf of United Airlines
23 against the flight attendants who were fired; is that
24 correct?

25 MR. REID: I object, and that's an improper

1 question.

2 MR. ROSENBLATT: Judge --

3 THE COURT: Come on, we'll talk about it one
4 more time.

5 (Proceedings were had at sidebar)

6 BY MR. ROSENBLATT:

7 Q. Did the tobacco companies or Reynolds or any
8 of the other tobacco companies ever provide you with
9 any statistical analysis that they had done internally
10 concerning any of the issues in this case?

11 A. None.

12 Q. You didn't ask for it?

13 A. Didn't want it, didn't ask. I do my own
14 work.

15 Q. And it wasn't offered?

16 A. They never offered it, I never asked. If
17 they would have offered it, I probably wouldn't have
18 taken it. I do my own work.

19 Q. You wouldn't have been curious to see what
20 their internal research, by their statisticians,
21 showed?

22 A. I wouldn't -- I just have to repeat it. I
23 only trust my own work. If I repeated it, I would
24 trust it. But just like I double-check the Surgeon
25 General, until I had gotten the same answer, I didn't

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1 know if he was right or not.

2 Q. Now, in the Attorney General cases where you
3 testified on behalf of the tobacco companies, and that
4 was Minnesota, Mississippi, Florida, Texas -- have I
5 left out any in which you testified, the Attorney
6 General cases?

7 A. I don't think so.

8 Q. Now, the issue -- those are the cases where
9 you prepared a statistical model demonstrating what?

10 MR. MOSS: Objection.

11 THE COURT: Overruled.

12 MR. REID: Outside the scope.

13 THE COURT: Overruled.

14 THE WITNESS: Your premise is wrong. I
15 didn't prepare --

16 BY MR. ROSENBLATT:

17 Q. What did you prepare?

18 A. In most of those cases there never was a
19 trial, so I never got around to finishing any work.
20 But I was asked about my opinions having to do with the
21 kinds of calculations that were going on there. I did
22 not prepare some model of my own.

23 Q. Well, isn't it a fact that all of those cases
24 had to do with the state trying to recoup Medicaid
25 costs and you said that --

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1 MR. MOSS: Objection, Your Honor.

2 MR. ROSENBLATT: And you said --

3 MR. MOSS: Your Honor.

4 THE COURT: All right. All right. I really

5 don't want to get into details of other cases that have
6 nothing to do with this case.

7 MR. ROSENBLATT: That's it. This has a great
8 deal to do with the issues.

9 MR. MOSS: May we go sidebar?

10 THE COURT: I don't think so. Let's proceed
11 with this case, the issues in this case. And the jury
12 will disregard the cases related to other matters as
13 expressed just two seconds ago.

14 BY MR. ROSENBLATT:

15 Q. Have you tried to figure out what it is about
16 smokers that makes them the way they are as compared to
17 nonsmokers?

18 MR. REID: Objection.

19 THE COURT: Sustained. It's not his field.

20 MR. ROSENBLATT: I'd like to be heard, Judge.

21 (Proceedings were had at sidebar)

22 BY MR. ROSENBLATT:

23 Q. You know, Doctor, you were asked some
24 questions, I think by Mr. Reid, to give some kind of
25 analogy of causation, and you were talking about polio.

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1 And then you -- I thought I heard you say
2 that there was some people who seriously contended that
3 the cause of polio was drinking a lot of Pepsi or Coke
4 or soda pop?

5 A. I know that from personal experience. My
6 parents. It was commonly thought back in the 50s that,
7 stay indoors, stay away from the swimming pool, don't
8 drink soda pop. There were lots of suggestions around.

9 My main point was not what my parents told me
10 to do, but that soda pop is a good example of a risk
11 factor.

12 Q. Dr. Wecker, was that ever a mainstream view,
13 expressed by qualified people and written about in
14 peer-reviewed journals, that the drinking of soda pop,
15 even in the 1950s, was that a mainstream view that the
16 drinking of soda pop caused polio? Or was that a very
17 fringe view?

18 A. I can't answer if it was mainstream or
19 fringe, because I haven't really studied the soda
20 pop/polio issue, but it's written in textbooks as an
21 example of a risk factor. And the whole idea of a risk
22 factor is that sometimes it's causal and sometimes it's
23 not. It's just an association.

24 Q. The thrust of your testimony on direct was
25 that the constantly repeated figure by the scientific

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1 and medical community of the United States, which says:
2 400,000 people, Americans, die every year as a result
3 of cigarette smoking, you said that number, from a
4 statistical standpoint, you don't agree with, you
5 didn't accept?

6 A. I say that -- I agree with the calculation.
7 I just point out that that is going to include things
8 other than smoking. In addition to smoking, it will
9 have elements of diet, exercise and other risk factors
10 included in it, because the smoking population has
11 those other risk factors.

12 What it really is is deaths attributable to
13 the group of smokers, regardless of what habits they
14 have: Smoking, less exercise, less healthy diet and so
15 on. So it's a combination of all those factors.

16 Q. You're a Ph.D in statistics, you've been
17 involved with the tobacco company since 1990, what's
18 your number? How many Americans do cigarette kill
19 every year?

20 A. I explained that, if I had a formula that
21 could resolve that question, I'd be very famous.
22 That's the difficulty of having to work with
23 observational data. You just can't move from an
24 association into a cause when you're dealing with
25 observational data. Nobody can do it. I can't do it,
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1 nobody can do it.

2 I can say this: That it's not a tiny factor,
3 because I've shown examples that these other factors,
4 like diet and exercise, are large influences as risk
5 factors. So I did investigate, is this just a small
6 thing that can maybe be neglected, or is this a big
7 thing? I think it's a big thing.

8 Q. Is your answer you don't have a number?

9 A. I thought I said that.

10 Q. You don't have a number, whether it's 1 or
11 500,000? You just don't know?

12 A. I tried to explain myself a little better
13 than that.

14 Q. Yes, you did. And doesn't that fit your
15 definition of a sniper: Criticize, find flaws and
16 offer nothing constructive?

17 A. I don't think that's fair. I think I have
18 provided helpful testimony and explanatory input here
19 to this court process. That's my view.

20 Q. The bottom line of your testimony is: The
21 Surgeon General is wrong, the New England Journal of
22 Medicine is wrong, the American Heart Association is
23 wrong, but I don't know what's right. I just know
24 they're wrong?

25 A. I know that the 400,000 number, the way it
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1 was calculated, will include elements other than
2 smoking. I know that.

3 MR. ROSENBLATT: Thank you. No further
4 questions.

5 THE COURT: Redirect.

6 MR. REID: I just have a few questions.

7 REDIRECT EXAMINATION

8 BY MR. REID:

9 Q. I just want to cover a couple of things,
10 Dr. Wecker. The article that you all talked about in
11 the very beginning, that was published in the Journal
12 of American Statistical Association. Do you recall
13 that discussion?

14 A. Yes, sir.

15 Q. Is that a peer-reviewed journal?

16 A. Yes.

17 Q. What would have happened to this article
18 before it appeared in this publication?

19 A. Gone to several referees and editors, and
20 they would have read every line, and come back with the
21 need for corrections if they found any errors.

22 Q. These would have been people who were skilled
23 in the field of statistics and the other matters that
24 were covered?

25 A. They would be experts in this area. That's
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1 the way you do it.

2 Q. And there's a footnote that was read --
3 MR. ROSENBLATT: Excuse me, I'm not clear on
4 what article we're talking about.

5 MR. REID: The lead thing.

6 BY MR. REID:

7 Q. And the footnote that you were read part of,
8 it also says that you were grateful to an associate
9 editor. What role did an associate editor have in the
10 article?

11 A. They wrote suggestions for elaborating the
12 article to what they thought were ways to improve it.

13 Q. Then you mentioned three anonymous referees.
14 Who are those people?

15 A. I don't know. They don't tell you.

16 Q. It's like: Who is buried in Grant's tomb? I
17 wanted to know not what are their names, but are they
18 people in the field of statistics?

19 A. They're experts.

20 Q. So they don't tell you who is reading your
21 article so you can't go and have any influence?

22 A. I referee a lot of papers. I was refereeing
23 one yesterday. That's an anonymous process, you don't
24 reveal your identity.

25 Q. Now, there was a question about whether the
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1 dean of the Harvard Public Health School agreed with
2 you.

3 Could you turn to Page 514 in this article,
4 it's comment, second comment.

5 A. Okay.

6 Q. I want you to look at this paragraph right
7 here. If you can see in the first column, the third
8 paragraph, see where I am, starts with "We
9 acknowledge"?

10 A. Yes.

11 Q. "We acknowledge that there is uncertainty
12 about the effects of low level lead exposure on the
13 I.Q. of children."

14 Was that your premise of your original
15 article?

16 A. Right.

17 Q. "Much of that uncertainty centers on the
18 possibility that unmeasured variables associated with
19 both lead level in the home and children's I.Q. may be
20 confounding this association."

21 A. That's right.

22 Q. Is that your point?

23 A. That's right.

24 "Marais and Wecker show that an indirect
25 correction for two plausibly important covariates,

1 paternal I.Q. and a simple assessment of the home
2 environment, may have significant effects on the
3 estimates of regression co-efficients for lead level."

4 Is that what you do?

5 A. Right, that's what I show.

6 Q. So he agreed with you?

7 A. Right.

8 Q. The assistant dean of the Harvard Business
9 School?

10 MR. ROSENBLATT: If you want to put in the
11 whole article, I don't object.

12 No response.

13 MR. REID: Judge, that's completely
14 inappropriate, what he just did.

15 MR. ROSENBLATT: I don't think it's
16 inappropriate.

17 THE COURT: The question is: Did you offer
18 the article?

19 MR. REID: I did not offer the article.
20 Because it's inadmissible because it's irrelevant.

21 THE COURT: All right. Go ahead.

22 BY MR. REID:

23 Q. Now, Mr. Rosenblatt asked you some questions
24 about Levin laws and about the formula. I don't recall
25 any questions about the methodology of your work and

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1 the methodology of using Levin's formula during your
2 questioning.

3 A. That's right. I don't remember any
4 substantive questions.

5 Q. Let's look at '89. Do you have a copy up
6 there?

7 A. No, I don't.

8 Q. The '89 Surgeon General's Report.

9 Now, your testimony was that the Levin
10 formula was used in reaching the attributable risk
11 number; is that correct?

12 A. Yes.

13 Q. Would you turn to Page 122. Under the
14 heading, The Concept Of Attributable Risk?

15 A. Yes.

16 Q. "Levin's computations" --

17 MR. ROSENBLATT: Well, read the first
18 sentence, please.

19 BY MR. REID:

20 Q. In 1953, Levin estimated that 62 to 92
21 percent of all male lung cancers were attributable to
22 cigarette smoking, Levin 1953. That's the article that
23 you've cited previously?

24 A. Right.

25 Q. Levin's computations addressed the general

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1 problem; how many cases of a disease in a given
2 population can be given by the presence of a particular
3 hazardous agent or particular personal trait; put
4 differently, how many cases would have been avoided but

5 for the presence of the agent or the trait?
6 Is that the statement that the Surgeon
7 General is using from the Levin formula?
8 A. Well, I know the Surgeon General uses the
9 formula, but he doesn't say he's using it here. He's
10 just talking about Levin.
11 Q. And describing Levin's approach?
12 A. But I can tell you, I know he used the Levin
13 formula. The formula you'll find on another page.
14 Q. I've got another one I want to ask you about
15 here.
16 A. The actual formula is on Page 124.
17 Q. Okay, which formula are you talking about?
18 A. Formula number 1.
19 Q. A equals P paren R minus L?
20 A. It's a 1, not an L.
21 Q. That's the Levin formula?
22 A. That's the Levin formula. If you take out --
23 this will give it as a fraction, then you multiply that
24 by the population.
25 Q. Is that the formula that you used in your
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1 work?
2 A. Yes.
3 Q. If you go back to the preceding page, 123,
4 can you tell us where the Surgeon General put in the
5 warning or the statement about the limitation of the
6 Levin formula? Under Mathematics of Attributable Risk,
7 I'm talking about.
8 A. Yes. I'll read the second sentence in that
9 paragraph on Page 123: The two samples are assumed not
10 to differ materially in any other respect.
11 Q. Is that the Levin?
12 A. That's Levin's point. That's the assumption
13 for the proper use of the formula.
14 Q. Now, you've told us that you disagree with
15 the use of the Levin formula with the observational
16 data; is that correct?
17 A. Unless you understand what it means, you can
18 use it. But then you'd be wrong to think that it meant
19 it was only referring to smoking.
20 Q. And the Surgeon General mentions the
21 limitations of the Levin formula; is that correct?
22 A. That's correct.
23 Q. Are there other scientists who agree that --
24 and you were asked this question, and you were limited
25 to the board, but now I'm not limiting you to the board
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1 -- but are there other scientists who agree that
2 Levin's formula is not appropriate where you're dealing
3 with observational data, where the two groups aren't
4 the same?
5 A. I think anyone who reads Levin's paper would
6 have to agree that Levin requires, for the proper
7 application of his formula, that there be no other
8 differences between the two groups. Where there are
9 differences that are systematic, then it will show up
10 in the result.
11 Q. You were asked questions about whether

12 anybody ever published anything or written anything. I
13 want to ask you if you're familiar with an article
14 written by a Robert Levy, who is a professor at
15 Georgetown Law Center, and Rosalind Marimont, a
16 mathematician and scientist, retired after a career --
17 MR. ROSENBLATT: I'm going to object to this,
18 Judge.

19 THE COURT: Where are you now?
20 MR. ROSENBLATT: Something I've never seen.
21 THE COURT: Which article are we talking
22 about? I thought we were in the Surgeon General's
23 Report.

24 MR. REID: No, sir, I changed to an article.
25 (Proceedings were had at sidebar)
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1 BY MR. REID:
2 Q. Dr. Wecker, we were discussing whether -- the
3 questions to you of whether there had been any
4 publication questioning the 400,000 methodology and so
5 forth. And I'm going to refer to the Regulation
6 Publication for Cato Review of Business and Government,
7 an article by Robert Levy --

8 MR. ROSENBLATT: Well, the name of the
9 publication is "Regulation."

10 MR. REID: That's what I said. Cato Review
11 of Business and Government. And the authors are Robert
12 Levy, a senior fellow in constitutional studies at the
13 Cato Institute, and an adjunct professor at Georgetown
14 University Law Center, where he teaches statistics for
15 lawyers.

16 And Rosalind B. Marimont is a mathematician
17 and scientist now retired after a 37-year career with
18 the National Institute of Standards and Technology,
19 formerly the Bureau of Standards, and the National
20 Institute of Health.

21 I want to read two sections, and then ask you
22 a question: Yet, if a smoker who is obese has a family
23 history of high cholesterol, diabetes and heart
24 problems, and never exercises, dies of a heart attack,
25 the government attributes his death to smoking alone.

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1 That procedure, if applied to the other causal factors
2 identified by the CPS study, would produce more than
3 twice as many attributed deaths as there are actual
4 deaths.

5 Is that consistent with your calculations?
6 A. Yes.

7 Q. And secondly, in the same article: To be
8 blunt, there is no credible evidence that 400,000
9 deaths per year, or any number remotely close to
10 400,000, are caused by tobacco.

11 Is that consistent with the research and work
12 that you did in this case?

13 A. Yes, I agree with that.

14 Q. Now, you were asked a series of questions,
15 and a group of names were pointed out on the Surgeon
16 General's document.

17 Do you have any information as to which, if
18 any of those, dealt specifically with the attributable

19 risk calculation portions of the Surgeon General's
20 Report?
21 A. Which authors you mean?
22 Q. Yes, of all the people whose names you saw?
23 A. I think Burns did.
24 Q. No, I'm talking about list of, this list of
25 all the people associated with the Surgeon General's
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1 Report that Mr. Rosenblatt showed you.
2 He asked you some questions about whether
3 they signed off on every word in the Surgeon General's
4 Report. I'm asking you if you have any personal
5 knowledge as to whether any of those people signed off
6 specifically?

7 A. I don't believe there's any specific
8 connection between the names and portions of the
9 report.

10 Q. Now, you've expressed the opinions that
11 you've given here today previously; is that correct?

12 A. Yes. I said this same thing to others.

13 Q. In some public trials?

14 A. Yes, two other times.

15 Q. Are you aware of any articles or any papers
16 anyone has written which calls into question your
17 analysis, since you first announced it publicly?

18 MR. ROSENBLATT: Objection, Your Honor.

19 THE COURT: Sustained.

20 BY MR. REID:

21 Q. He asked you some questions about the example
22 that you gave, the polio example.

23 A. Yes.

24 Q. And you mentioned "textbook"?

25 A. Yes.
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1 Q. Does that information appear in a recognized
2 book on statistics that's used, or textbook of any
3 type?

4 A. Yes.

5 Q. Do you recall the name?

6 A. Well, there may be more than one.

7 Q. Where have you seen it?

8 A. Yesterday, you asked me, and I called my
9 office, and one of the first books they came to had the
10 example. It's the Friedman, and other authors with
11 long names. They're statistics texts. They're from
12 Berkley.

13 Q. Is that a book that's used in colleges,
14 universities?

15 A. Yes. It's an introductory textbook, it's
16 widely used.

17 Q. Now, you asked some questions -- you were
18 asked some questions about relative risk, numbers, at
19 the end of your testimony.

20 A. Yes.

21 Q. You mentioned something about Japan. Now,
22 I'd like you to tell the jury what data you've reviewed
23 that talks about the relative risk using the Japanese
24 model compared to the American model.

25 MR. ROSENBLATT: Judge, I did not ask any

1 questions on cross.

2 THE COURT: He mentioned it as an answer.
3 And you didn't ask him about it. That's true. It
4 wasn't a question that was asked. He just offered the
5 information in his answer. So I'm going to sustain the
6 objection.

7 MR. REID: May I be heard on that, Your
8 Honor?

9 THE COURT: No, it's not necessary, let's get
10 on with it.

11 MR. REID: Excuse me one second.

12 BY MR. REID:

13 Q. I have a bunch of notes people send me.
14 Let's see if there's anything else I forgot to ask you.
15 Dr. Wecker, if you consider what you've heard
16 today on cross examination, material that's been
17 pointed out to you, is there any basis to arrive at a
18 different conclusion but that the Surgeon General of
19 the United States understood the limitations of the
20 Levin formula?

21 MR. ROSENBLATT: Objection, Your Honor.

22 THE COURT: Just a second.

23 You're asking him as to whether or not the
24 Surgeon General has reached a different conclusion or
25 understood the limitations of the Levin formula.

1 MR. REID: I'll rephrase it, Your Honor.

2 BY MR. REID:

3 Q. Did the Surgeon General acknowledge the
4 limitations of the Levin formula?

5 A. Yes, the Surgeon General Report plainly
6 stated those limitations.

7 Q. And did the Surgeon General use the Levin
8 formula in any way?

9 A. Yes.

10 MR. REID: That's all I have.

11 THE COURT: You may step down. Thank you
12 very much.

13 (The witness left the stand)

14 THE COURT: We'll pick it up tomorrow.
15 Let me take this issue up with Juror No. 3.
16 You want to know about tomorrow because you have
17 something to do in the afternoon. What's that all
18 about?

19 JUROR NO. 3: I've got to leave for the
20 airport in the afternoon. I have a pet I've got to
21 take to boarding.

22 THE COURT: You're leaving, is that it,
23 tomorrow?

24 JUROR NO. 3: Yes.

25 THE COURT: Was that on our list? You're the

1 one that has to go on the 7th. And the 7th is what,
2 Friday?

3 Where are you going, anyway?

4 JUROR NO. 3: D.C.

5 THE COURT: In order to get the flight,
6 you've got to leave early because you've got some pets
7 at home that have to be taken care of. What is your
8 time frame here?

9 JUROR: Well, the flight leaves at 6:00.
10 THE COURT: On Thursday.
11 JUROR: Right.
12 THE COURT: And you want to leave here when?
13 JUROR: As far away from 6:00 as possible.
14 THE COURT: Is there anybody else that can
15 take care of these animals while you're gone?
16 JUROR: My wife, she's going to be going with
17 me.

18 THE COURT: Based upon what the lawyers told
19 me this morning, looks like you're in good shape.

20 MR. HEIM: Just picked a good day.
21 THE COURT: How many pets have you got?
22 JUROR NO. 3: I got a parrot and cockateel
23 and a dog and some fish. Like a zoo.
24 THE COURT: All right. We'll see you folks
25 tomorrow at 9:15.

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1 (The jurors exited the courtroom.)
2 THE COURT: Off the record.
3 (Discussion off the record.)
4 MR. ROSENBLATT: My understanding, tomorrow,
5 you've got Kinser if she's here. And then you were
6 talking -- now I just heard from my office, we do not
7 have -- in other words, anything that you're planning
8 on reading tomorrow we'd like to receive today so we
9 can be in a position --

10 THE COURT: That's for the documents that you
11 want to talk about.

12 MR. HEIM: There's not that many of them, and
13 counsel already has them because we went over them just
14 a couple of weeks ago. I faxed a list over.

15 Now, if she doesn't have them, even though I
16 know she does because I gave her a copy two weeks ago
17 because we went over them, just call me.

18 MR. ROSENBLATT: I'm calling you.

19 MR. HEIM: Stan.

20 MR. ROSENBLATT: You've got them.

21 MR. HEIM: Well, so do you.

22 MR. ROSENBLATT: But we don't know where they
23 are. That's the difference. We may have them, but
24 have no idea where they are.

25 THE COURT: They're in a box.

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1 MR. ROSENBLATT: Two cab drivers in the Bronx
2 could have settled this in two seconds.

3 MR. REID: I may want to offer these boards
4 in evidence.

5 THE COURT: In evidence?

6 MR. REID: Yes. Under your previous ruling.

7 MR. MARTINEZ: Judge, and we've got copies,
8 but I don't know if they'll be ready. So, next week.

9 (The trial was adjourned at 4:50 p.m.)

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